

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of HOWARD/CAIN, Minors.

UNPUBLISHED
November 21, 2013

No. 315769
Wayne Circuit Court
Family Division
LC No. 12-510577-NA

Before: SAWYER, P.J., and O'CONNELL and K. F. KELLY, JJ.

PER CURIAM.

Respondent mother appeals as of right from a circuit court order terminating her parental rights to the minor children pursuant to MCL 712A.19b(3)(b)(i), (g), and (j). We affirm.

The trial court terminated respondent's parental rights to five-year-old AH and one-year-old AC. This child protective proceeding was initiated after AH disclosed that respondent had burned him with a hair dryer and respondent gave an explanation that was inconsistent with the nature of the injury.

Respondent argues that the trial court erred in admitting AH's hearsay statement to a protective services worker regarding the injury. The trial court's ruling regarding the admission of evidence is reviewed for an abuse of discretion. *Elezovic v Ford Motor Co*, 472 Mich 408, 419; 697 NW2d 851 (2005). Questions of law regarding admissibility, including the proper application of the rules of evidence, are reviewed de novo. *Waknin v Chamberlain*, 467 Mich 329, 332; 653 NW2d 176 (2002).

The child's hearsay statement was admitted under MCR 3.972(C)(2), which provides, in relevant part:

Any statement made by a child under 10 years of age . . . regarding an act of child abuse, child neglect, sexual abuse, or sexual exploitation, as defined in MCL 722.622(f), (j), (w), or (x), performed with or on the child by another person may be admitted into evidence through the testimony of a person who heard the child make the statement as provided in this subrule.

(a) A statement describing such conduct may be admitted regardless of whether the child is available to testify or not, and is substantive evidence of the act or omission if the court has found, in a hearing held before trial, that the circumstances surrounding the giving of the statement provide adequate indicia of

trustworthiness. This statement may be received by the court in lieu of or in addition to the child's testimony.

"Circumstances indicating the reliability of a hearsay statement may include spontaneity and consistent repetition, the mental state of the declarant, use of terminology unexpected of a child of a similar age, and lack of motive to fabricate." *In re Brimer*, 191 Mich App 401, 405; 478 NW2d 689 (1991). Where a statement is made during a forensic interview, the fact that the interview is conducted in accordance with the state's forensic interview protocol is another indicium of trustworthiness. *In re Archer*, 277 Mich App 71, 82; 744 NW2d 1 (2007). "Whether particular guarantees of trustworthiness are present depends on the totality of the circumstances." *Brimer*, 191 Mich App at 405.

Respondent does not dispute that AH made the statement when he was under the age of 10 and that the statement referred to an act of child abuse.¹ The worker testified that she interviewed AH using the forensic interview protocol. She identified the steps in the protocol and testified that she followed them. According to the worker, AH spontaneously stated that he was burned by his mother when asked a general question about living with her. There was no evidence that the child had a motive to falsely accuse respondent of child abuse. Respondent argues that the statement should not have been admitted for various reasons. Although she contends that the worker did not follow the protocol, she does not explain what the worker did or failed to do that violated protocol requirements. We note that the worker admitted that she did not follow the protocol by ascertaining to whom certain "generic terms" like mom, dad, aunt, or uncle referred to, but there was no evidence that RH referred to anyone other than respondent as his mother. Respondent notes that the interview was very brief and that AH could not specify when the incident occurred, but she does not explain how either circumstance affects the trustworthiness of the child's statement. Respondent also notes that AH had "emotional and behavioral problems" and was being assessed for special services, but there was nothing to show that his problems and educational needs affected his ability to distinguish reality from fantasy or his capacity to tell the truth. Finally, respondent takes issue with the trial court's failure to "obtain an independent examiner" to testify, but she has not shown that an interview conducted by an independent examiner was likely to have elicited any information different from that obtained by the worker. We find no basis for concluding that the trial court abused its discretion in admitting the child's statement under MCR 3.972(C)(2)(a).

Respondent also takes issue with petitioner's failure to provide her with reunification services before proceeding to termination. Child protective proceedings are largely governed by statute, and statutory interpretation is a question of law that is reviewed de novo on appeal. *Douglas v Allstate Ins Co*, 492 Mich 241, 255-256; 821 NW2d 472 (2012).

Before the court enters an order of disposition, the Department of Human Services (DHS) is required to prepare a case service plan which shall include, among other things, a "[s]chedule of services to be provided to the parent, child, and . . . the foster parent, to facilitate the child's

¹ Child abuse is defined to include harm to a child's health or welfare that occurs through nonaccidental physical injury by a parent. MCL 722.622(f).

return to his or her home or to facilitate that child's permanent placement." MCL 712A.18f(2) and (3)(d). "Reasonable efforts to reunite the child and family must be made in all cases" subject to certain exceptions, one of which is that "[t]here is a judicial determination that the parent has subjected the child to aggravated circumstances as provided in . . . MCL 722.638." MCL 712A.19a(2)(a). Those aggravated circumstances include a situation in which a parent has abused the child or a sibling of the child and the abuse included "[b]attering, torture, or other severe physical injury." MCL 722.638(1)(a)(iii).² The evidence showed that respondent held a hot hair dryer to AH's skin long enough to brand him with a permanent scar because he was being "bad." This conduct qualifies as "torture," i.e., "inflicting excruciating pain, as punishment or revenge, . . . or for sheer cruelty." *Random House Webster's College Dictionary* (1997). The trial court did not err in finding that reasonable efforts at reunification were not required in this case under MCL 722.638.

Finally, respondent challenges the termination decision itself. The trial court's finding that at least one statutory ground for termination has been proven by clear and convincing evidence is reviewed for clear error. *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000); MCR 3.977(K). "A finding of fact is clearly erroneous if the reviewing court has a definite and firm conviction that a mistake has been committed, giving due regard to the trial court's special opportunity to observe the witnesses." *In re BZ*, 264 Mich App 286, 296-297; 690 NW2d 505 (2004).

The trial court did not clearly err in finding that §§ 19b(3)(b)(i) and (j) were both established by clear and convincing legally admissible evidence. *In re Utrera*, 281 Mich App 1, 16-17; 761 NW2d 253 (2008); MCR 3.977(E)(3) and (K). Photographic evidence showed that AH sustained a severe burn injury that left him permanently scarred. AH repeatedly stated that respondent had inflicted the injury with a hair dryer as punishment for some unknown transgression. When confronted with the child's accusation, respondent gave a nonsensical excuse and gave a nonsensical explanation for that excuse at trial. Given that respondent deliberately burned the child and refused to acknowledge that she had done anything wrong, the trial court did not clearly err in finding that the children were reasonably likely to be injured or abused if placed in respondent's home. Because termination was warranted under §§ 19b(3)(b)(i) and (j), it is unnecessary to consider whether the trial court erred in relying on § 19b(3)(g) as an additional ground for termination. Any error in relying on either § 19b(3)(g) was harmless. *In re Powers*, 244 Mich App 111, 118; 624 NW2d 472 (2000).

Finally, the trial court did not clearly err in its determination of the children's best interests. MCL 712A.19b(5); *In re Trejo*, 462 Mich at 356-357; MCR 3.977(K). Although there was evidence that respondent loved the children and was bonded with them, there was also evidence that respondent showed little regard for the children's safety as demonstrated by the fact that she deliberately burned AH with a hair dryer so severely as to leave a permanent scar. There was also evidence that respondent failed to take advantage of the liberal visitation granted

² Under such circumstances, petitioner is required to request termination at the initial dispositional hearing. MCL 722.638(2).

to her. Finally, there was evidence that respondent was unable to support the children as demonstrated by the fact that she was unable to support herself and relied on charity from friends and family. Accordingly, the trial court did not clearly err in finding that termination of respondent's parental rights was in the children's best interests.

Affirmed.

/s/ David H. Sawyer

/s/ Peter D. O'Connell

/s/ Kirsten Frank Kelly